No. 14,780

IN THE

United States Court of Appeals

For the Ninth Circuit

WESLEY LAWRENCE UFFELMAN,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

LLOYD H. BURKE,
United States Attorney,
RICHARD H. FOSTER,
Assistant United States Attorney,
422 Post Office Building,
7th and Mission Streets,
San Francisco 1, California,
Attorneys for Appellee.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Rules

Statutes

Regulations

No. 14,780

IN THE

United States Court of Appeals

For the Ninth Circuit

WESLEY LAWRENCE UFFELMAN,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

JURISDICTION.

Jurisdiction is invoked under Section 3231 of Title 18 United States Code, and Rule 27(a)(1) and (2) of the Federal Rules of Criminal Procedure. This case arises from a violation of Section 462 of Title 50 App. United States Code.

STATEMENT OF THE CASE.

Appellant first registered with Selective Service on September 18, 1948 (File 3[1]). His occupation was that of a dairy and beef farmer (File 8). He was classi-

[1] "File" refers to appellant's Selective Service file which was United States Exhibit No. 1 in the Court below.

fied by his Local Board in Class I-A on December 11, 1951 (File 52). His case was referred to the Department of Justice for inquiry and hearing with respect to the character and good faith of his conscientious objections pursuant to Section 6(j) of the Universal Military Training and Service Act (File 61). On July 8, 1952 T. Oscar Smith, Special Assistant to the Attorney General, recommended that his claim of conscientious objection be sustained (File 59). The Appeal Board classified appellant in Class I-O (File 64). Appellant appealed his classification of I-O to the Presidential Appeal Board on March 17, 1953 (File 96). On June 3, 1953 appellant was reclassified I-A (File 98). On June 25, 1953 appellant was ordered to report for induction (File 101). On July 8, 1953 he refused to submit to induction (File 105). On July 29, 1953 he was indicted, and on October 23, 1953 acquitted of violating the Universal Military Training and Service Act (File VII and 14). On November 13, 1953 appellant was reclassified in Class I-O (File 15). Appellant appealed this classification on November 22, 1953 (File 19). At that time he worked as a hod-carrier at wages of $2.65 per hour (File 26). On November 22, 1953 appellant asked for a personal appearance (File 21). He submitted various letters and material to support his position that he was a minister of religion (File 24-54). Among this material was a letter signed by Homer L. Hendrickson, the Presiding Minister of the South Unit of the Sacramento Jehovah's Witnesses, Alex Uffelman, Assistant Presiding Minister, and Paul R. Hal-

bert, Bible Study Servant (File 31). Also, Mr. Albert O. Breece wrote a letter to the Board in which he stated that Uffelman was connected with "the Bible and ministerial work of Jehovah's Witnesses." (File 52). At the trial a statement was made that Mr. Hendrickson and Mr. Breece had accompanied appellant to his hearing (Tr. 48) but were not allowed to come before the Board. (Tr. 34, 48). At this time appellant was an Advertising Servant of the Sacramento South Unit of Jehovah's Witnesses, that is to say, the unit whose presiding minister was Mr. Hendrickson (File 24). At the trial Uffelman testified that as an Advertising Servant he was "just in charge of the magazines" and had no control over their distribution (Tr. 50). The Local Board continued appellant in Class I-O on December 10, 1953 (File 63). On January 7, 1954 appellant was classified I-O by the Appeal Board (File 72). After having a personal appearance on March 9, 1954 where he stated that his work was that of a hod-carrier (File 92), appellant was ordered to report on April 27, 1954 for institutional work at the Los Angeles County Department of Charities (File 108). It was stipulated at the trial although ordered to report, the defendant did not report as ordered (Tr. 20). Appellant was indicted for failing to comply with the order of his Local Board on January 19, 1955 (Tr. 4). Trial by jury was waived (Tr. 6). Appellant was tried by the Court, the Honorable Oliver J. Carter presiding, on March 11, 1955 (Tr. 17). There, the Clerk of the Local Board was asked whether any advisors were appointed dur-

ing the period of appellant's registration (Tr. 21). She answered, "Well, the Board members always act as advisors. The coordinator acts as an advisor. And there is an appeal agent that acts as an advisor * * *" (Tr. 21). Colonel Ferrill, an official of the Selective Service System, testified that a government appeal agent is required to be an attorney (Tr. 29). The Clerk of the Local Board testified that the names, addresses and phone numbers of the government appeal agent and the Board members were posted on her desk (Tr. 23). Appellant testified that during the period of his classification he had received advice from the legal counsel for Jehovah's Witnesses, Mr. Hayden C. Covington (Tr. 46, 47). After a motion for acquittal was denied appellant was found guilty as charged and sentenced to a term of a year and a day (Tr. 13). Notice of appeal was timely filed from the judgment of conviction.

STATUTES AND REGULATIONS.

Section 6(j), Universal Military Training and Service Act:

> *Conscientious objectors.*—Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not

include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the

appeal board that (1) he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors.

Regulation 1604.41

Advisors to Registrants. Appointment and Duties.

Advisors to registrants shall be appointed by the Director of Selective Service upon recommendation of the State Director of Selective Service

to advise and assist registrants in the preparation of questionnaires and other selective service forms and to advise registrants on other matters relating to their liabilities under the selective service law. Every person so appointed should be at least 30 years of age. The names and addresses of advisors to registrants with the local board area shall be conspicuously posted in the local board office.

Regulation 1624.1 Opportunity to Appear in Person.

(a) Every registrant, after his classification is determined by the local board (except a classification which is itself determined upon an appearance before the local board under the provisions of this part), shall have an opportunity to appear in person before the member or members of the local board designated for the purpose if he files a written request therefor within 10 days after the local board has mailed a Notice of Classification (SSS Form No. 110) to him. Such 10-day period may not be extended.

(b) No person other than a registrant shall have the right to appear in person before the local board, but the local board may, in its discretion, permit any person to appear before it with or on behalf of a registrant: *Provided,* That if the registrant does not speak English adequately he may appear with a person to act as interpreter for him: *And provided further,* That no registrant may be represented before the local board by anyone acting as attorney or legal counsel.

Regulation 1626.25 (effective at time of appellant's classification) *Special Provisions When Appeal Involves Claim that Registrant Is a Conscientious Objector.*

(a) If an appeal involves the question whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the appeal board shall take the following action:

(1) If the registrant has claimed, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and by virtue thereof to be conscientiously opposed to participation in combatant training and service in the armed forces, but not conscientiously opposed to participation in noncombatant training and service in the armed forces, and the local board has classified the registrant in Class I-A-O, the appeal board shall proceed with the classification of the registrant. If, in such a case, the local board has classified the registrant in any class other than Class I-A-O, the appeal board shall transmit the entire file to the United States Attorney for the Federal judicial district in which the appeal board has jurisdiction for the purpose of securing an advisory recommendation from the Department of Justice.

(2) If the registrant has claimed, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and by virtue thereof to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces, and the local board has classified the registrant in Class I-O, the appeal board shall

proceed with the classification of the registrant. If, in such a case, the local board has classified the registrant in any class other than Class I-O, the appeal board shall transmit the entire file to the United States Attorney for the Federal judicial district in which the appeal board has jurisdiction for the purpose of securing an advisory recommendation from the Department of Justice.

QUESTIONS PRESENTED.

1. Does the failure to appoint a specified person "Advisor to Registrant" deny due process of law where the Clerk of the Local Board, Board members and a government appeal agent, who is an attorney, were available to give advice and the registrant in fact received advice from the legal counsel of Jehovah's Witnesses?

2. Is a registrant deprived of procedural due process of law when, although he has received one hearing before the Department of Justice concerning the good faith of his conscientious objections, he does not receive a second inquiry and hearing but is in fact classified as a conscientious objector?

3. Is Regulation 1624.1, Universal Military Training and Service Act, allowing persons to appear in behalf of the registrant only in discretion of the Local Board, invalid?

ARGUMENT.

I. APPELLANT WAS NOT DEPRIVED OF ADVICE SO AS TO DENY HIM DUE PROCESS OF LAW.

Appellant's main argument in the instant case is based upon dicta in *Chernekoff v. United States* (C.A. 9, 1955), 219 F.2d 721. In the course of an opinion reversing a case for many errors the Court observed, "The failure of the local board to comply with the posting of names and advisors as provided by 32 Code Fed. Regs. Section 1604.41 presents another problem of due process." Appellant's argument that no advisors were available to him apparently rests upon the testimony of Colonel Ferrill that no "advisor" was appointed as specifically provided in Section 1604.41. It is undisputed, however, that persons were available to act as advisors to registrants and that the names of these advisors were posted in the local board office. The Clerk of the Local Board testified that Board members, the Selective Service Coordinator and the government appeal agent acted as advisors (Tr. 21). She also testified that the names of these persons were posted on her desk (Tr. 23). Colonel Ferrill testified that the government appeal agent was required to be an attorney (Tr. 29). He further testified that the persons termed "advisors" under the 1940 Act were utilized for the purpose of assisting registrants in making out their questionnaires and were laymen (Tr. 30), Colonel Ferrill also observed that Selective Service has fewer full time employees now than under the 1940 Act and that clerks were required to "double up" on their duties (Tr. 31).

Appellant is claiming a deprivation of due process of law. Such a deprivation requires more than the lack of a title. Assuming that no persons were appointed to appellant's Local Board who had the title "Advisor to Registrants", it is clear that all the advice appellant desired was immediately available to him. Under the 1940 Act a distinct position was created for the purpose of assisting in the completion of questionnaires. Under the present Act those duties are carried out by the regular employees of the draft board. Section 1604.41 was never interpreted by the administrative agency involved as mandatory but always was assumed to be permissive by the agency itself (Tr. 31). The job done by the layman "advisor" of 1940 is presently being accomplished by attorney government appeal agents and others who are familiar with Selective Service procedure. The fact that the government appeal agent does not wear a title "Advisor to Registrants" makes his advice no less valuable.

Section 1604.41 was complied with in appellant's case. Persons were available for advice and their names were posted. More than that is not required. It should be noted that on an individual's draft card itself there is a notation that for advice a registrant should see his government appeal agent (SSS Form 2). This Court has indicated its agreement with the principle expressed in *Martin v. United States* (C.A. 4, 1951), 190 F.2d 775, namely, that "procedural irregularities or omissions which do not result in prejudice to the registrant are to be disregarded."

Knox v. United States (C.A. 9, 1952), 200 F.2d 398. In order to take advantage of any procedural irregularity a defendant in a Selective Service case must make some showing of prejudice from the procedure adopted. *United States ex rel. McCarthy v. Cook,* (C.A. 3, 1955), 225 F.2d 71; *United States v. De Lime* (C.A. 3, 1955), 223 F.2d 96; *Eagles v. Samuels,* 329 U.S. 304.

What showing has appellant made here? Examination of the voluminous file in the case discloses no procedural right of which appellant did not take advantage. Every hearing allowed by law was requested by appellant. Every opportunity to present material to support his position was seized. It is apparent by an examination of the file and of appellant's testimony in the Court below that he was intimately familiar with all his rights under the Selective Service Act. Appellant made no showing that he was prejudiced from a lack, if any, of an advisor.

His testimony was directly to the contrary. As a matter of fact, appellant did have advice. He had advice from probably the outstanding authority on Selective Service law today. A superficial examination of the Supreme Court cases involving Selective Service will disclose his name. It might be added that the records of this Court show his appearance as counsel for appellants in innumerable cases arising under the Selective Service Act. Appellant's advisor was the legal counsel for Jehovah's Witnesses, Mr. Hayden C. Covington of New York City (Tr. 46, 47). Appellant, according to his own testimony, consulted

with Mr. Covington during the whole period of his classification and, more particularly, on the last classification which resulted in the order that appellant violated (Tr. 47).

II. APPELLANT WAS NOT DEPRIVED OF PROCEDURAL DUE PROCESS OF LAW BY THE LACK OF A SECOND DEPARTMENT OF JUSTICE HEARING.

Appellant received a hearing by the Department of Justice with respect to the character and good faith of his conscientious objections as required by Section 6(j) of the Universal Military Training and Service Act (File 61). The Special Assistant to the Attorney General recommended that his claim of conscientious objection be sustained (File 59). In 1953, however, after the Appeal Board had classified appellant in Class I-O, on his appeal to the Presidential Appeal Board he was classified I-A (File 96). After his 1953 acquittal of failure to submit to induction he was reclassified in Class I-O (File 15). On this occasion appellant's file was not referred to the Department of Justice for a hearing because (as stated by appellant) Regulation 1626.25 provided that the file should be referred to the Department of Justice only where the "local board has classified the registrant in any class other an I-O" (App. Br. 21, 32 C.F.R., Section 1626.25). It was the position of Selective Service that this amended regulation was declaratory of existing law. This Court, however, in the case of *Sterrett v. United States* (C.A. 9, 1954), 216 F.2d 659, held that the regulation was contrary to the intendment of the

statute because since the Appeal Board had power to classify registrants in any class, a I-O classification might be considered without the benefit of a Department of Justice recommendation to the detriment of the registrant. *Sterrett v. United States,* supra, at 663. This Court observed:

> "The registrant whose evidence presented to the local board and whose personal appearance are such as to impress that board that he is entitled to a I-O classification, finds himself at a distinct disadvantage; he is denied a hearing before a hearing officer when he appeals for a ministerial classification and the board, after denying that, comes to consider Class I-O, the next lowest class claimed by him, as it is required to do under Regulation §1626.26, supra. Had he made a less favorable showing before the local board and been classified I-A to begin with and then appealed seeking exemption on both ministerial and conscientious objector grounds he would have had the hearing.
>
> "There is no doubt but that the legislative history of §6(j) indicates that it was the understanding and intention of Congress to provide a reference of all conscientious objector claims not initially granted by the appeal board to the Department of Justice * * *" *Sterrett v. United States,* supra, at 663, 664.

Section 6(j) of the Act concerns only conscientious objectors. It provides that

> "The Department of Justice, after appropirate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the

> person concerned, * * * The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of induction be ordered by his local board, * * * to perform * * * such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate * * *"

It is to be noted that the Department of Justice recommendations are limited to the question of the good faith and character of the registrant's conscientious objections. Section 6(g) governs the deferment of ministers of religion, and there is no requirement nor provision for a recommendation by the Department of Justice in cases arising under this exemption.

The *Sterrett* case held merely that the appellant's classification there was improper because he had been deprived of any benefit the Department of Justice report might have had with respect to a consideration of his conscientious objector claim. Here, appellant received a conscientious objector classification. Appellant could have received no benefit from a Department of Justice recommendation, nor suffer any detriment from its lack, because he, in fact, received all that the Department of Justice was empowered to recommend that he receive.

It appears, further, that appellant had actually received a Department of Justice hearing. The De-

partment of Justice's recommendation was for a I-O classification. The Department of Justice had given appellant all that it was empowered to give him. All that a further hearing could have done would be to create the possibility of an *unfavorable* recommendation. Appellant is merely asking to replay a game which he has already won.

It is to be observed that the *Sterrett* case did not hold that a Department of Justice hearing was constitutionally required. The granting of exemptions and the procedure therefor is entirely in the discretion of Congress.

Richter v. United States (C.A. 9, 1950), 181 F.2d 591;

George v. United States (C.A. 9, 1952), 196 F.2d 445.

The *Sterrett* case only held that Section 6(j) of the Universal Military Training and Service Act requires a Department of Justice hearing in conscientious objector cases. It did not hold that a Department of Justice hearing must be held in all Selective Service cases. Where, as here, appellant has received a conscientious objector classification, he has no valid complaint concerning the lack of such a hearing. Such a hearing could not conceivably have benefited him nor its lack have prejudiced him. Without prejudice there can be no deprivation of procedural due process of law.

Martin v. United States (C.A. 4, 1951), 190 F.2d 775;

Knox v. United States (C.A. 9, 1952), 200 F.2d 398;

United States ex rel. McCarthy v. Cook (C.A. 3, 1955), 225 F.2d 71;
United States v. De Lime (C.A. 3, 1955), 223 F.2d 96;
Eagles v. Samuels, 329 U.S. 304.

III. SECTION 1624.1 OF THE REGULATIONS IS NOT INVALID.

Section 1624.1(b) of the Selective Service regulations provides that

> "No person other than a registrant shall have the right to appear in person before the local board, * * *"

The local board, to be sure, has the right to allow persons to appear on behalf of the registrant. Appellant has neither mentioned this regulation nor shown any basis for its invalidity. There is certainly no constitutional infirmity since proceedings before a Selective Service Board are not a trial. *United States v. Nugent,* 346 U.S. 1. The Selective Service statute contained no provisions inconsistent with Regulation 1624.1(b). In the absence of some showing by appellant, the general rule that regulations should be upheld unless clearly contrary to law should be followed.

Appellant made no real showing that he was denied permission to present witnesses to the Board. The record at pages 33 and 34 of the transcript is somewhat ambiguous. Appellant does not state that he informed the Board that he had witnesses or that it refused his request for their testimony. On cross-

examination all appellant states is that he told the Local Board "that I had Mr. Hendrickson and Mr. Breece waiting and that I would like to have them come in * * * And that they could verify the things that I had to say were true." (Tr. 48).

Assuming, however, that permission to call witnesses was in fact denied, appellant has made no showing that this lack was prejudicial to him. It is the Appeal Board which actually gives the final classification in these cases.

Cramer v. France (C.A. 9, 1945), 148 F.2d 801;
Tyrell v. United States (C.A. 9, 1952), 200 F.2d 8;
Reed v. United States (C.A. 9, 1953), 205 F.2d 216.

As is said in *Tyrrell v. United States,* supra,

> "Such action completely and finally supersedes the action of the local board in classifying * * *, although the classification of the Appeal Board is the same as that of the local board." (at page 11.)

In the *Tyrrell* case the summary prepared by the local draft board was incomplete. However, the registrant's whole file was sent to the Appeal Board, and it contained the information claimed to be lacking in the local board's summary of proceedings. In *Knox v. United States* (C.A. 9, 1952), 200 F.2d 398, this Court reversed a conviction because no personal appearance was given the registrant at all. That is not the situation here. The instant case falls within the rule of the *Tyrrell* case. Here any information which

the registrant claimed Mr. Hendrickson and Mr. Breece could supply had already been supplied. Both Hendrickson and Breece filed statements with the Board (File 31, 52). Mr. Hendrickson's letter was received on December 3, 1953 and Mr. Breece's letter on December 8, 1953. Appellant's hearing was held on December 8, 1953. The Appeal Board, therefore, had all the factal information which these two persons could have supplied. Appellant's argument with respect to the effectiveness of oral explanation has already been ruled upon by this Court in the case of *Jerry Lee Reese v. United States,* No. 14,596, decided August 22, 1955. The Court there held that oral presentation even by the registrant was not the *sine qua non* of a valid classification by Selective Service.

Appellant has not made any showing that Regulation 1624.1 is invalid nor has he shown that any prejudice resulted from the lack of Mr. Hendrickson's and Mr. Breece's testimony. If they could have testified as to matters other than contained in their letters to the Board, appellant could have proved that fact by calling them as witnesses. Appellant's characterization or speculation concerning the testimony they might have given is not sufficient to require this Court to hold that he was prejudiced by the lack of their testimony.

Nothing here has been shown which would justify any finding of abuse of discretion on the part of the Board. The Court below, after hearing appellant's testimony, found to the contrary. This Court, without

even the advantage of hearing the manner in which appellant testified or seeing him testify should not come to a contrary conclusion.

CONCLUSION.

Appellant has not shown any error in the proceedings below or in his administrative classification. He admittedly failed to obey an order of his local draft board. The judgment of the District Court should be affirmed.

Dated, San Francisco, California,
November 2, 1955.

Respectfully submitted,

LLOYD H. BURKE,
United States Attorney,
RICHARD H. FOSTER,
Assistant United States Attorney,
Attorneys for Appellee.